NO. 56944-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

In re the Detention of

DERWIN LERON PASLEY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

CROSS-RESPONSE AND REPLY BRIEF OF APPELLANT

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I. RESPONSE TO CROSS-APPEAL

The Sexually Violent Predator Act (SVPA) permits the State to petition for a person's civil commitment as a sexually violent predator (SVP) when:

> (a) A person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement; (b) a person found to have committed a sexually violent offense as a juvenile is about to be released from total confinement; (c) a person who has been charged with a sexually violent offense who has been determined to be incompetent to stand trial is about to be released, or has been released . . . (d) a person who has been found not guilty by reason of insanity of a sexually violent offense is about to be released, or has been released . . . or (e) *a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement and has committed a recent overt act.*

RCW 71.09.030(1) (emphasis added).

The SVPA defines a "recent overt act" (ROA) in two ways:

> [A]ny act, threat, or combination thereof that has *either* caused harm of a sexually violent nature *or* creates a reasonable apprehension of such harm in the mind of an objective person who knows of the

> history and mental condition of the person engaging in the act or behaviors.

RCW 71.09.020(13) (emphasis added).

It is undisputed that Mr. Pasley was convicted of a sexually violent offense in 2010, when he pleaded guilty to two counts of second-degree child molestation. BOA at 7 (citing Ex. 1); RCW 71.09.020(18) ("Sexually violent offense" includes "child molestation in the first or second degree"). But because he was released to the community for more than a year following his term of confinement for those offenses, the State was required to prove he committed an ROA. See CP 4 (quoting RCW 71.09.030(1)(e)). The State alleged Mr. Pasley's ROA was the act, for which he was presently incarcerated, resulting in his pleas to the non-sex offense of third-degree assault (negligence). CP 2.

In Det. of Marshall, 156 Wn.2d 150, 158, 125 P.3d 111 (2005), our Supreme Court held that the trial court, rather than the jury, must determine whether the offense for which the

respondent is currently incarcerated meets the definition of an ROA in RCW 71.09.020(13). But the facts of the alleged ROA in Marshall were undisputed: the petitioner advanced only the procedural argument that due process required the State "plead and prove [an ROA] beyond a reasonable doubt," at a jury trial. 156 Wn.2d at 156; see also Det. of Marshall, 122 Wn. App. 132, 138, 90 P.3d 1081 (2004) (respondent argued in Court of Appeals that State could not rely on third degree rape conviction to prove ROA-equivalent, because that offense is neither sexually violent under SVPA nor even violent under Sentencing Reform Act).

In this case, the State seeks to radically extend Marshall's holding, arguing that it *requires* the trial court to treat "the entire record of [an alleged ROA-equivalent] conviction as established facts"—even when that record contains conflicting evidence. State's Resp. at 63. The trial court rightly rejected this argument. As demonstrated by the facts in this case, the procedure the State proposes would often be impossible, would always be illogical, and would never be consistent with due process.

A. RESTATEMENT OF THE CASE

The State moved pre-trial for a ruling that Mr. Pasley's "convictions for two counts of Assault in the Third Degree – Negligence qualify as a '[ROA]' *as a matter of law*, thereby relieving Petitioner of proving at trial that the behavior constitutes an ROA." Sub. No. 94 at 1 (emphasis added). In support of this motion, the State appended several documents, including a transcript of K.R.'s initial law enforcement report; the declaration of probable cause supporting the initial charges of indecent liberties (three counts) and third-degree rape; the amended information charging two counts of third-degree assault; Mr. Pasley's plea statement in that case; and the resulting felony judgment and sentence. Sub. No. 105 at 8-42.

In his initial report, K.R. told the responding officer that Mr. Pasley sat next to him in the living room on three occasions and touched his penis and butt, at one point penetrating his anus with a finger. Sub. No. 105 at 9-11. The responding officer asked K.R., "Did . . . you ever tell [Mr. Pasley] you didn't want

him to be touching you?" and K.R. responded that he did not, because he was scared. Sub. No. 105 at 14.

According to the declaration of probable cause, Detective Reynolds approached Mr. Pasley at his workplace, about ten days after K.R.'s initial report, and told him that K.R. had reported "some touching." Sub. No. 105 at 19. The declaration went on to note: "Detective Reynolds told [Mr. Pasley] that K.L.R. was 18 years old *and this was different from his previous cases*." Sub. No. 105 at 19 (emphasis added).

In the plea statement, Mr. Pasley wrote:

> I am entering this plea pursuant to In re Barr[1]. Although my conduct does not specifically meet the elements of the crime of Assault in the 3rd Degree, I am pleading guilty to those charges as a result of a plea deal with the State that benefits me greatly. However, I do agree that about February 9, 2020, and again on about February 10, 2020, in Thurston County, Washington, I did intentionally touch K.L.R. in an offensive manner. I agree that if this matter had proceeded to trial, there is a substantial likelihood that a jury could have found me guilty of the more serious charges originally filed against me, I further agree the Court may review the

[1] 102 Wn.2d 265, 684 P.2d 712 (1984).

> prosecutor's statement of probable cause to establish a factual basis for the plea.

Sub. No. 105 at 41.

The "charges originally filed" alleged three counts of indecent liberties by forcible compulsion and one count of third-degree rape accomplished by sexual intercourse "with K.L.R. . . . who did not consent as defined in RCW 9A.44.010(7)." Sub. No. 105 at 20-21. The declaration of probable cause alleges three separate instances of touching (sexual contact) and only one instance of penetration. Sub. No. 105 at 18-19.

The State also appended to its motion the entire evaluation prepared by its expert witness, Dr. Fox, whom it planned to call at trial. Sub. No. 94 at 81-141.

In its substantive motion, the State relied on K.R.'s initial report and the declaration of probable cause as if these documents contained only undisputed facts. Sub. No. 94 at 3-6. Then, the State made two arguments: (1) the encounter with K.R. constituted an ROA because it "caused harm of a sexually violent

nature" and (2) "an objective person knowing the factual circumstances of Pasley's history and mental condition would have a reasonable apprehension that him touching K.R.'s penis, butt and anus would cause harm of a sexually violent nature." Sub. No. 94 at 8. The first argument invokes the first prong of the ROA definition in RCW 71.09.020(13); the second argument invokes the second-prong definition.

In support of the second argument, the State cited Dr. Fox's evaluation, which was prepared solely for the commitment trial and contained numerous conclusions disputed by Mr. Pasley's expert, Dr. Abbott. Sub. No. 94 at 8-9; see BOA at 19-22.

The defense filed a response appending, among other documents, Dr. Abbott's expert evaluation and the transcript of Mr. Pasley's November 20, 2020, plea colloquy and sentencing in the case arising from the encounter with K.R. CP 212-28, 254-332. At the 2020 hearing, the trial court found that the facts alleged in the declaration of probable cause "do create a

substantial likelihood the trier of fact would find you guilty beyond a reasonable doubt of the crimes as originally charged." CP 221.

Contrary to that finding, however, the declaration of probable cause contains no allegation that Mr. Pasley used force to accomplish sexual contact with K.R. Sub. No. 105 at 18. It is therefore unclear why the court believed there was a factual basis for the indecent liberties counts. Nevertheless, the court purported to find such a basis and accepted Mr. Pasley's In re Barr plea. CP 221.

The parties to the 2020 plea then presented the agreed sentencing recommendation, whereupon *the prosecutor disavowed the factual basis for all the indecent liberties counts*:

> As the Court can see, Mr. Pasley was previously convicted of sex offenses. And the State is mindful that initially that the Court had made findings for probable cause for indecent liberties with force. After receiving all the discovery in the case and also speaking with the victim in this case - - which [defense counsel] also interviewed the victim - - from the State's perspective, had the case proceeded to trial, I think the only charges that the State would

> have been able to proceed on would have been rape in the third degree. Although still very serious, the standard range - - because Mr. Pasley would in essence be maxed out on another sex offense conviction - - rape in the third degree carries the maximum sentence of five years.
>
> This is an agreed recommendation. [Defense counsel] and I have been in negotiations for a very long time after he had a chance to interview the victim and also the victim's mom. This is also on a recommendation that was reached that the State is agreeing to after speaking [to] [sic] the victim's mom as well. [Defense counsel] and I both had a chance to meet with the victim. He is a very bright - - I say "kid" even though he is over 18 years old. He is a bright kid. I have spoken to his mom almost four occasions. He has emotionally moved on from the case . . .

CP 222.

> Defense counsel elaborated:
>
> Ultimately, I agree with [the prosecutor's] assessment that, when I interviewed the victim here, he was, I believe, clearly competent. That really wasn't an issue. Despite the fact that he was on a Special Olympics team, I don't believe there was a capacity issue involved. However, *there was a dispute about consent* in recognizing Mr. Pasley's prior history, the circumstances, the proposal.

CP 224 (emphasis added).

The court imposed the agreed 18-month term, telling the parties, "And I understand there is factual disputes here. I get that." CP 226.

In this case, even after Mr. Pasley filed his response to the State's ROA motion, the State continued to insist—contrary to the prosecutor's express assertion at the 2020 sentencing hearing—that the In re Barr plea constituted proof of indecent liberties with forcible compulsion. RP (Feb. 25, 2022) at 12-13. Counsel for the State in the SVP proceedings told the court:

> And so we allege that because the facts contained in that statement of probable cause support the charge of indecent liberties by forcible compulsion, which is a sexually violent offense under the statute, his behavior did actually cause harm of a sexually violent nature. So that first prong [of RCW 71.09.020(13)] is satisfied.

RP (Feb. 25, 2022) at 15.

Turning to the second-prong ROA definition, counsel for the State argued K.R. "appeared younger than his age and had learning disabilities that put him at a fifth or sixth grade level, so [K.R.] was more similar to respondent's past victims than a

typical 18-year-old male." RP (Feb. 25, 2020) at 16. This, she said, would give an objective person "reasonable apprehension that [Mr. Pasley's] sexual assault of [K.R.] would cause harm of a sexually violent nature." RP (Feb. 25, 2020) at 16-17. She acknowledged that a second-prong determination would require the court to consider "the factual circumstances of [Mr. Pasley's] . . . mental condition," which had never been adjudicated, and that this was why the State had submitted Dr. Fox's full evaluation along with its motion. See RP (Feb. 25, 2022) at 18, 24-25. But she simultaneously tried to convince the court that the State was not *really* asking for any fact-finding on Mr. Pasley's mental condition, and that the court should consider Dr. Fox's report only "to give a holistic picture of Mr. Pasley, his mental condition, his history, his life." RP (Feb. 25, 2022) at 25-26.

The trial court saw through this. It denied the State's motion, reasoning that a pre-trial ruling, under Marshall, "would be appropriate in a different record, but under this record . . .

there remain contested issues." RP (Feb. 25, 2022) at 26. The court wisely determined that "at this stage in this litigation it does not make sense for the court to . . . set up an evidentiary hearing but, rather, to set these matters as part of the . . . bench trial, and the court at that time can make appropriate findings of fact." RP (Feb. 25, 2022) at 26-27.

The State moved to reconsider, arguing that Mr. Pasley was estopped to deny any of the allegations in the statement of probable cause underlying the 2020 charges *or* the legal conclusion that they satisfied the elements of indecent liberties by forcible compulsion. RP (Mar. 25, 2022) at 4-5. In the alternative, the State argued "the record of Mr. Pasley's sex offense convictions alone clearly supports the second test is satisfied." RP (Mar. 25, 2022) at 5. The State did not clarify whether, by "sex offense convictions," it meant to include the 2020 convictions for third-degree assault. RP (Mar. 25, 2022) at 5.

Confusingly, the State maintained Mr. Pasley *could* dispute the facts underlying his In re Barr pleas "at the SVP trial in contesting the State's claims that he has a mental abnormality or that he poses the requisite risk to be found an SVP," but that he could not dispute them "for purposes of the Court's pretrial ROA determination." CP 534. The State said this was "to prevent the State from having to substantively prove the underlying facts of a conviction . . . at the SVP trial, where *the State will not be calling [K.R.] . . . to introduce substantive evidence of the sexual assault.*" CP 534-35 (emphasis added).

In other words, the State asked the trial court to determine, "as a matter of law" pretrial, the very facts that Mr. Pasley could later dispute at trial. This would save the State the trouble of having to prove what Mr. Pasley had the right to dispute.

The court denied the motion to reconsider. RP (Mar. 25, 2022) at 9. The State now appeals the trial court's pretrial rulings related to the alleged ROA. State's Resp. at 50-51.

B. ARGUMENT IN RESPONSE

THE TRIAL COURT PROPERLY DENIED THE STATE'S MOTION FOR A PRETRIAL ROA DETERMINATION "AS A MATTER OF LAW"

The de novo standard of review generally applies when the appellate court stands in the same position as the trial court, and may therefore make a determination as a matter of law, while the abuse of discretion standard applies to the trial court's factual determinations. State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004) (citing State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003)). Thus, to the extent an ROA determination presents a question of law, it is reviewed de novo. Det. of Anderson, 166 Wn.2d 543, 549, 211 P.3d 994 (2009) (citing Marshall, 156 Wn.2d at 158) ("We review de novo whether Anderson's [undisputed] acts were recent and overt."); accord Mohr v. Graham, 172 Wn.2d 844, 859, 262 P.3d 490 (2011) (summary judgment decision reviewed de novo).

But trial management decisions, including whether to bifurcate proceedings, and the trial court's denial of a motion to

reconsider, are reviewed for abuse of discretion. Shanghai Commercial Bank Ltd. v. Kung Da Chang, 189 Wn.2d 474, 479, 404 P.3d 62 (2017) (denial of motion to reconsider reviewed for abuse of discretion); Det. of Mines, 165 Wn. App. 112, 124-25, 266 P.3d 242 (2011) (trial court did not abuse discretion by refusing to bifurcate ROA determination from rest of SVP jury trial).

On appeal, the State has abandoned the argument that the acts underlying Mr. Pasley's In re Barr pleas constituted an ROA under the first prong of RCW 71.09.020(13) ("caused harm of a sexually violent nature"). State Resp. at 51 (Issue 2), 70; RCW 71.09.020(13). But it maintains its position that, under Marshall, the respondent to SVP commitment proceedings may never contest any allegation in "the ROA conviction materials" (a term of art the State does not define), even when the allegations in question were never adjudicated *and will be disputed at the SVP trial*. State's Resp. at 63 & n.7.

This Court must reject the State's extreme and unworkable argument and affirm the trial court's sensible rulings.

1. Due process protections prohibit the State from indefinitely civilly committing a person without first proving, by clear and convincing evidence, that he committed an overt act.

No person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend XIV; Const. art. I, § 3. Involuntary commitment under chapter 71.09 RCW is a significant deprivation of liberty triggering due process protections. Det. of Thorell, 149 Wn.2d 724, 731, 72 P.3d 708 (2003) (citing Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992)). A law that restricts a fundamental right such as liberty satisfies substantive due process only if it furthers a compelling state interest and is narrowly tailored to further that interest. Det. of Albrecht, 147 Wn.2d 1, 7, 51 P.3d 73 (2002). The narrow-tailoring requirement is satisfied if the State proves that a person is both mentally ill and dangerous before committing him. In re Young,

122 Wn.2d 1, 37, 857 P.2d 989 (1993), superseded by statute on other rounds as stated in Det. of Thorell, 149 Wn.2d 724, 72 P.3d 708 (2003).

Because predicting dangerousness is an inexact science, courts must vigilantly protect against commitment based on irrational fear. In re Harris, 98 Wn.2d 276, 281, 654 P.2d 109 (1982). Courts protect against such abuses by "requiring demonstration of a substantial risk of danger and by imposing procedural safeguards and a heavy burden of proof." Id. Thus, in the civil commitment context, procedural due process requires the State prove that a respondent is both mentally ill and dangerous by, *at a minimum*, clear and convincing evidence. Foucha v. Louisiana, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992); Addington v. Texas, 441 U.S. 418, 433, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); In re Det. of Turay, 139 Wn.2d 379, 423, 986 P.2d 790 (1999).

The "dangerousness" necessary to justify civil commitment is *current* dangerousness. Albrecht, 147 Wn.2d at

10. This always requires proof of an "overt act," but the manner in which the State proves this act depends on the respondent's confinement status.

Where the respondent was released to the community when the State filed the SVP commitment petition, the State must prove that, in addition to "the prior sexually violent offense that forms the basis for the petition," the respondent also committed an ROA. Albrecht, 147 Wn.2d at 8-11. The SVPA requires the State to prove this at trial, beyond a reasonable doubt. RCW 71.09.060(1); Det. of Lewis, 163 Wn.2d 188, 194, 177 P.3d 708 (2008).

Where the respondent is incarcerated when the State files the petition, the State must prove it was for an act that would qualify as an ROA. Albrecht, 147 Wn.2d at 8-11; Det. of Henrickson, 140 Wn.2d 686, 695-96, 1 P.3d 473 (2000). Under these circumstances, the State need not prove an *additional* ("recent") overt act, separate from the act resulting in the incarceration, because such a requirement would be "absurd"

where the respondent has been continuously incapacitated by confinement. Albrecht, 147 Wn.2d at 10. Nevertheless, the State must *always* prove that, during or after his most recent period of release to the community, the respondent to an SVP petition committed an act meeting one of the definitions in RCW 71.09.020(13).

This requirement is not merely statutory, it is a matter of due process. Albrecht, 147 Wn.2d at 8 ("This Court has upheld RCW 71.09.030's constitutionality upon a due process challenge by a person who has been released from total confinement only where the State has demonstrated a substantial risk of physical harm as evidenced by a recent overt act") (citing Young, 122 Wn.2d at 41-42; Laws of 1995, ch. 216 § 3); id. at 10-11 ("[t]o relieve the State of the burden of proving a recent overt act [simply] because an offender is [incarcerated] . . . would subvert *due process*") (emphasis added). Thus, if an alleged SVP has lived in the community after committing the offense "forming the basis for the petition," and then he is subsequently re-

incarcerated, no presumption arises about the conduct underlying the re-incarceration. Id. Instead, due process demands the State *prove* this conduct meets the ROA definition in RCW 71.09.020(13), and that it do so by clear and convincing evidence. Albrecht, 147 Wn.2d at 8; Mines, 165 Wn. App. at 125-26 (explaining that "due process" requires State to establish current dangerousness by proof of ROA).[2]

2. Whether the act underlying a conviction meets the second-prong definition of an ROA is a mixed question of fact and law, but when the trial court addresses this question pretrial it may not find facts.

As noted, Marshall held that the court, rather than the jury, must determine whether the offense for which the respondent is

[2] Division One purported to reject this evidentiary standard, in dicta, in Det. of Brown, 154 Wn. App. 116, 119, 225 P.3d 1028 (2010). Brown's reasoning on this point—which contains the sentence, "Because Albrecht is concerned with when the State must prove a recent overt act and because the State proved a recent overt act in this case, Albrecht is inapposite," id. at 127, is inconsistent with Foucha, Addington, Albrecht, and basic logic.

currently incarcerated meets the definition of an ROA in RCW 71.09.020(13):

> The court must either determine from the materials relating to the individual's conviction whether the individual is incarcerated for an act that actually caused harm of a sexually violent nature [the first prong of the ROA definition], or it must determine whether the individual was incarcerated for an act that qualifies as a recent overt act under a two-step analysis [the second prong of the ROA definition].

Marshall, 156 Wn.2d at 158 (citing State v. McNutt, 124 Wn. App. 344, 350, 101 P.3d 422 (2004)).

> Under that two-step analysis, an inquiry must first
>
> be made into the factual circumstances of the individual's history and mental condition; second, a legal inquiry must be made as to whether an objective person knowing the factual circumstances of the individual's history and mental condition would have a reasonable apprehension that the individual's act would cause harm of a sexually violent nature.

Id.; see RCW 71.09.020(13). Here, the State contends Mr. Pasley's encounter with K.R. qualifies under the two-step (second-prong) analysis. State Resp. at 51 (Issue 2), 70.

In McNutt, 124 Wn. App. at 350, this Court (Division One) referred to the second-prong inquiry as "a mixed question of fact and law." But this Court has repeatedly held that "the trial court's role under the factual inquiry prong *is not that of a fact finder*." Det. of Leck, 180 Wn. App. 492, 509-10, 334 P.3d 1109 (2014) (quoting Brown, 154 Wn. App. at 125). Rather, "the court need only review facts already established." Id.

When the trial court conducts the two-step / second-prong inquiry, it can certainly prevent the respondent from attempting to "[re]litigate" facts already established in a prior criminal proceeding. See Brown, 154 Wn. App. at 125. Mr. Pasley does not contend otherwise. But the trial court may not do what the State requested in this case: treat disputed facts as if they were undisputed, pretend that unadjudicated facts had been adjudicated, and ignore critical evidence in the record. None of the authority on which the State relies authorizes those abuses.

3. Contrary to the State's theory, neither Marshall, McNutt, nor Brown holds that the trial court must treat every allegation underlying an Alford[3] or In re Barr plea as if it were an adjudicated fact for purposes of a pretrial ROA determination.

Consistent with state and federal due process protections, a trial court may not accept a defendant's guilty plea without first determining that the plea is knowing and voluntary. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969); State v. A.N.J., 168 Wn.2d 91, 117, 225 P.3d 956 (2010). To make a voluntary, knowing, and intelligent guilty plea, "[a] defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements." State v. R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006). "Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and

[3] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

intelligent guilty plea." Id. (citing State v. Chervenell, 99 Wn.2d 309, 317-18, 662 P.2d 836 (1983)).

To ensure that a plea is truly voluntary, "CrR 4.2(d) provides that a trial court 'shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.'" State v. Berry, 129 Wn. App. 59, 65, 117 P.3d 1162 (2005). This rule guards against the possibility that a defendant will plead guilty "'without realizing that his conduct does not actually fall within the charge.'" Id. (quoting 13 Royce A. Ferguson, Jr., WASH. PRACTICE: CRIMINAL PRACTICE AND PROCEDURE, § 3713, 91-92 (3rd ed. 2004)). The trial court must find a factual basis for any plea, whether "straight," Alford, or In re Barr. See State v. D.T.M., 78 Wn. App. 216, 220, 896 P.2d 108 (1995) ("Ordinarily, when a defendant pleads guilty, the factual basis for the offense is provided at least in part by the defendant's own admissions. With an Alford plea, however, the court must establish an entirely independent factual basis for the guilty plea.").

In an In re Barr plea, such as Mr. Pasley entered in 2020, the CrR 4.2(d) inquiry asks not whether there is a factual basis for the plea actually entered, but whether there is a factual basis for a different offense originally charged. State v. Zhao, 157 Wn.2d 188, 199-200, 137 P.3d 835 (2006). In any event, a factual basis is neither proof beyond a reasonable doubt nor an admission of guilt. State v. Newton, 87 Wn.2d 363, 369-70, 552 P.2d 682 (1976). It is simply a means of ensuring the plea is knowing and voluntary: that trial poses an actual risk of conviction and the defendant therefore receives an actual benefit from the plea. Id.; see D.T.M., 78 Wn. App. at 220 ("A defendant considering an Alford plea undertakes a risk-benefit analysis. After considering the quantity and quality of the evidence against him . . . he agrees to plea guilty despite his protestations of innocence to take advantage of plea bargaining.").

Crucially, a defendant may perceive a risk of conviction even where he knows he is innocent. E.g., State v. Scott, 150 Wn. App. 281, 283-84, 286, 293, 207 P.3d 495 (2009)

(defendant, who entered Alford plea to rape of a child because he "did not 'see a chance of winning'" at trial, entitled to evidentiary hearing on credibility of new evidence—which came to light four years later, after State initiated SVP commitment proceedings—tending to "prove that [defendant] did not commit the crime for which he entered an Alford plea," and that witnesses fabricated evidence for that charge due to anti-gay animus); In re Spencer, 152 Wn. App. 698, 218 P.3d 924 (2009) (petitioner entitled to withdraw Alford plea, after serving 20 year-sentence for multiple counts of child rape, because newly discovered evidence undermined factual basis for plea). This is why an Alford plea has no preclusive effect in a subsequent civil action. Clark v. Baines, 150 Wn.2d 905, 916, 84 P.3d 245 (2004)).

Contrary to precedent and logic, the State in this case seeks to transform Mr. Pasley's In re Barr plea—i.e., his agreement that the declaration of probable cause articulated a factual basis for the greater charges—into irrefutable proof of every allegation in

the 2020 "conviction materials." State's Resp. at 63 & n.7. As noted, it is not clear what the State means by "conviction materials." It appears to contend the trial court was bound to credit every allegation in the declaration of probable cause and K.R.'s initial report (and the related conclusions in Dr. Fox's evaluation), but *not* the prosecutor's subsequent concession that there was insufficient evidence of indecent liberties, and not the facts Mr. Pasley recounted in his deposition.

The State purports to derive this unworkable rule from three cases: McNutt, 124 Wn. App. at 346; Marshall, 156 Wn.2d 150; and Brown, 154 Wn. App. at 119. But these cases establish no such rule.

State v. McNutt

Mr. McNutt had one conviction for indecent liberties on his record when he entered an Alford[4] plea to communicating with a minor for immoral purposes. McNutt, 124 Wn. App. at

[4] North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

346. While he was serving his time for that offense, the State petitioned to have him indefinitely committed as an SVP. Id. The trial court erroneously concluded that communicating with a minor for immoral purposes constituted an ROA as a matter of law, under Henrickson, 140 Wn.2d 686, regardless of the facts underlying the conviction. McNutt, 124 Wn. App. at 346.

On appeal, Mr. McNutt argued that the trial court erred because (1) communicating with a minor for immoral purposes is not a *per se* ROA (because it is not statutorily defined as a sexually violent offense); and (2) the record was insufficient to support a conclusion that the facts underlying his conviction constituted an ROA, because "an Alford plea . . . allows [the defendant] to deny elements of the crime in later civil actions" Id. at 349.

This Court, Division One, agreed that the conviction was not a *per se* ROA, and that *a factual inquiry was therefore necessary*. Id. at 350. The Court then went on to recite the

apparently *undisputed* facts in that case, and to conclude that any reasonable person would find they established an ROA:

> The factual inquiry determines the factual circumstances of McNutt's history and mental condition, and the legal inquiry determines whether an objective person knowing those factual circumstances would have a reasonable apprehension of harm of a sexually violent nature resulting from the act in question. Moreover, the fact that McNutt entered an Alford plea does not change the nature of the trial court's inquiry into his history. Although the trial court did not engage in a factual analysis on the record for this appeal, we conclude from the record that only one conclusion is reasonable: McNutt's acts at the time of the crime for which he remained incarcerated create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person who knows the history and mental condition of the person engaging in the act, as required under [former] RCW 71.09.020(10).
>
> The record reflects that McNutt suffers from pedophilia and sexual sadism. He has a history of offering young boys money, beer, or cigarettes to perform sadistic acts upon him while he masturbates. For example, in 1972, McNutt offered several different junior high school boys money and cigarettes to tie him to his bed and slap and hit him. He also performed oral sodomy on the boys and had anal intercourse with them while tied up. He tried to entice the boys to insert ice cubes into his anus, but they refused. He had them pour hot water on

> him while he was tied up. He paid the boys to urinate in his mouth. In 1981, McNutt offered several boys money if they would beat him with a belt while he masturbated. It was not unusual for McNutt to use older youths to lure younger ones into the sexually charged situation.
>
> At the time of the State's petition, McNutt was incarcerated for the crime of communicating with a minor for immoral purposes based on his inviting four people—three young adult males and one 14 year old girl—to his home, giving them beer and inviting them to engage in various sex acts with him. He told the four that he wanted to be their sex slave and that he would do whatever they wanted him to do. He asked the 14-year-old girl to write on his body with lipstick. He showed them a paddle and said he wanted to be spanked with it when he was bad.

Id. at 350-51.

The McNutt Court concluded that it was theoretically possible for someone "with a sexually violent criminal history to commit . . . communicating with a minor for immoral purposes without also committing a recent overt act as defined by statute." Id. at 352. But it held that, "under these facts . . . McNutt is not that person." Id.

Det. of Marshall

Mr. Marshall committed three sexual offenses against minors between 1989 and 1992, including child molestation and felony communication with a minor for immoral purposes, and released to community custody in 1995. Marshall, 156 Wn.2d at 153. While on community custody, he attempted to lure two 11-year old girls, thereby violating a sentencing condition prohibiting his contact with minor girls. Id. Finally, in 1996 a jury convicted Mr. Marshall of third-degree rape, based on his "nonconsensual sexual intercourse with an adult female . . . [who] was developmentally disabled and functioned at the level of a 10- to 12-year-old girl." Id. at 154. While Mr. Marshall was incarcerated for that offense, the State petitioned for his SVP commitment, but it did not allege any ROA in the petition. Id.

At the probable cause hearing, Mr. Marshall moved to dismiss the petition, arguing that due process required the State to plead and prove an ROA. Id. The trial court denied the motion because it concluded that the third-degree rape for which Mr.

Marshall was convicted was an ROA, "based upon the nature of the rape, as alleged in the charging document *and proved at the rape trial*, and [Mr. Marshall's] history of offenses and mental condition." Id. at 159 (emphasis added). Mr. Marshall proceeded to a bench trial in which the court found he met the criteria for civil commitment as an SVP. Id. at 156.

On appeal, Mr. Marshall argued due process required the State to "plead and prove beyond a reasonable doubt that he had committed a 'recent overt act' in order to commit him as a sexually violent predator." Id. at 156. The Supreme Court held:

> [D]ue process *does not require the State to prove a recent overt act when*, on the day a sexually violent predator petition is filed, *an individual is incarcerated* for a sexually violent offense . . . or *for an act that would itself qualify as a recent overt act*.
>
> *Instead*, where the individual is incarcerated on the day the petition is filed, *the question is whether the confinement is for* a sexually violent act or *an act that itself qualifies as a recent overt act.*

Id. at 157-58 (emphases added).

The Marshall Court affirmed "the analysis in State v. McNutt, 124 Wn. App. . . . [at] 350," to the limited extent it held that "the inquiry whether an individual is incarcerated for an act that qualifies as a recent overt act is for the court, not a jury." Marshall, 156 Wn.2d at 158. Finally, it affirmed the trial court's conclusion that the third-degree rape for which Mr. Marshall was incarcerated constituted an ROA because:

> Marshall's history includes numerous incidents of seeking out and molesting young children. He was diagnosed as suffering from pedophilia, sexual sadism and nonspecified paraphilia. His diagnosis of sexual sadism resulted in part from Marshall's fantasies of molesting and hurting or killing young girls. In light of Marshall's history and mental condition, the third degree rape, which involved non-consensual sex with a developmentally disabled woman who functioned at the level of a 10-or12-year-old, would create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person.

Id. at 159.

Det. of Brown

Mr. Brown had an undisputed 20-year criminal history including multiple acts of first-degree child molestation and

second-degree rape of a child, perpetrated against more than 20 victims between the ages of 4 and 13. Brown, 154 Wn. App. at 119. After serving a long prison term for these offenses, Mr. Brown was released to community supervision and almost immediately began downloading child pornography. Id. at 120. When his community corrections officer discovered this, Mr. Brown was tried for and convicted of seven counts of possessing depictions of a minor engaged in sexually explicit conduct. Id.

While Mr. Brown was incarcerated for those offenses, the State petitioned to have him committed as an SVP. Id. *Over no objection*, the trial court determined, pre-trial, that the conduct underlying Mr. Brown's present incarceration (possessing sexually explicit depictions of minors) constituted an ROA. Id. at 120-21. Mr. Brown appealed, arguing the trial court committed manifest constitutional error when it made the ROA determination without holding "an evidentiary hearing" applying the "clear and convincing evidence standard." Id. at 122.

Without saying what evidentiary standard *does* apply to the ROA inquiry, this Court, Division One, held that Mr. Brown had waived any objection to the following facts, *by failing to challenge them at the ROA pretrial hearing*:

> Brown was confined at the time the petition was filed for a criminal offense, possession of child pornography. Before this offense, Brown had pleaded guilty to child molestation in the first degree. While undergoing a SSOSA evaluation, Brown engaged in sexual contact with a 13-year-old girl. After he was charged with rape of a child in the second degree, he waived his right to a jury trial and stipulated to the evidence against him. The trial court found Brown guilty. Brown has a history of lying about his offense, suffers from pedophilia, and has an offense cycle that begins with viewing adult pornography, then barely legal pornography, and culminating in child pornography just before actually targeting a child. Brown also admitted that at the time of his arrest for viewing child pornography he was so far into his offense cycle that he was beyond the point of self-intervention.

Id. at 128.

Finally, after noting that "Brown did not challenge these facts during his pretrial hearing," Division One concluded:

> The trial court *does not act as factfinder* when deciding whether the act resulting in incarceration

> is a recent over act. Therefore, due process does not require that the trial court conduct an evidentiary hearing to make this preliminary determination. As explained above, the clear and convincing evidence standard does not apply to this determination. Finally, the record supports the trial court's determination that Brown's possession of child pornography was an overt act because knowledge of Brown's history and mental condition could create a reasonable apprehension of harm of a sexually violent nature in the mind of an objective person.

Id. at 129 (emphasis added).

Neither Marshall, McNutt, nor Brown holds that an In re Barr plea renders indisputable every fact alleged in the underlying probable cause statement, for purposes of a subsequent SVP civil commitment trial. Nor (of course) does it hold that such a plea somehow establishes the respondent's yet-to-be adjudicated mental condition. Instead, each of these cases simply affirms the trial court's finding that the *undisputed* facts establish a second-prong ROA.

In this case, under Marshall, 156 Wn.2d at 159, the State had the right to request a pretrial determination that undisputed or already-adjudicated facts established that Mr. Pasley was

incarcerated for an act constituting and ROA. But the State had no right to demand pretrial fact-finding on incomplete evidence.

Contrary to the State's theory on appeal, the trial court never "conclud[ed] that it could not consider the probable cause statement and other materials from the record of conviction of Pasley's ROA offense." State's Resp. at 69-70. Rather, the court carefully considered *all* the materials related to the 2020 assault pleas, including the prosecutor's statement to the court that the evidence was insufficient to proceed on the indecent liberties counts; the prosecutor's statement that K.R. was "very bright" and had "emotionally moved on from this case"; defense counsel's statement that "there was a dispute about consent"; and the 2020 plea and sentencing court's statement that "there is factual disputes here." See RP (Feb. 25, 2022) at 26 ("under this record . . . there remain contested issues"); CP 222, 224, 226.

The "facts" the State asked the trial court to find, pretrial and as a "matter of law," included that K.R. "appeared younger than his age and had learning disabilities that put him at a fifth or

sixth grade level," that Mr. Pasley "touched . . . K.R.'s penis, butt, and anus multiple times . . . without K.R.'s consent," and "the factual circumstances of [Mr. Pasley's] . . . mental condition." RP (Feb. 25, 2022) at 16, 18, 24-25; Sub. No. 100 at 2. None of these facts are established by the materials related to the In re Barr plea, let alone by clear and convincing evidence, and all of them were the subject of legitimate dispute at the SVP trial.

To borrow Division One's framework in McNutt: it is theoretically possible for an In re Barr plea to result in undisputed facts from which a trial court could find an ROA, but Mr. Pasley's In re Barr plea does not present such undisputed facts. See McNutt, 124 Wn. App. at 352. That is precisely what the trial court determined. The trial court was correct.

4. Even if a proper In re Barr plea constituted proof of every related allegation, for purposes of a second-prong ROA determination, that rule would not apply here because Mr. Pasley's plea does not appear to have been entered knowingly and voluntarily.

To convict Mr. Pasley of indecent liberties by forcible compulsion against K.R., the State would have to have proved he used "more than the force normally used to achieve sexual . . . contact" with K.R. State v. Ritola, 63 Wn. App. 252, 254, 817 P.2d 1390 (1991) (citing State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989)). As noted, no such force is described in the declaration of probable cause supporting the 2020 pleas. Sub. No. 105 at 18. Thus, consistent with the prosecutor's statement at sentencing, there was no factual basis for any indecent liberties count. See State v. Cross, 178 Wn.2d 519, 526, 309 P.3d 1186 (2013) (citing State v. Newton, 87 Wn.2d 363, 369-70, 552 P.2d 682 (1976)) (evidence establishes factual basis for plea only if sufficient to sustain jury verdict).

While the declaration of probable cause alleged three acts of sexual contact (touching), it alleged only one act of penetration; accordingly, the State brought only one count of rape in the original information. Sub. No. 105 at 17-21; see former RCW 9A.44.010(1) (2020) ("sexual intercourse" requires penetration); former RCW 9A.44.060 (2020) (third-degree rape requires "sexual intercourse"). Yet the State secured *two* convictions for third-degree assault—negligence. Ex. 2 at 1.

The convictions violate double jeopardy protections, under this Court's analysis in State v. Robinson, 8 Wn. App. 2d 629, 439 P.3d 710 (2019).

In Robinson, 8 Wn. App. 2d at 631, the State charged Mr. Robinson with felony violation of a no-contact order. To prove that offense, the State had to prove beyond a reasonable doubt that Mr. Robinson "had 'at least two previous convictions for violating the provisions of an order' issued under specific statutes." Id. at 634-35 (quoting former RCW 26.50.110(5)). It offered into evidence Mr. Robinson's guilty pleas, entered one

year earlier, to two misdemeanor counts of domestic violence violation of a court order. Id. at 632-33.

The record from Mr. Robinson's plea colloquy indicated the State had originally charged him with a felony, based on a single incident in which he violated a no-contact order by assaulting the protected party (his wife). Id. To avoid a felony conviction, Mr. Robinson pleaded guilty to two misdemeanors, but the parties agreed only one was supported in fact. Id. at 632-34, 639. It was undisputed that the second misdemeanor conviction was "based on pure fiction." Id.

The judge who accepted Mr. Robinson's misdemeanor pleas apparently believed In re Barr permitted this fiction. Robinson, 8 Wn. App. 2d at 632-33. This Court, Division One, disagreed, holding that multiple convictions arising from "one act" violated double jeopardy protections. Id. at 638-39. Accordingly, it held Mr. Robinson could collaterally attack his pleas for purposes of the subsequent prosecution. Id. at 639-40.

Like Mr. Robinson's misdemeanor pleas, Mr. Pasley's 2020 pleas to third-degree assault plainly violate double jeopardy protections.[5] The 2020 declaration of probable cause contains a factual basis for only one offense (third-degree rape), yet Mr. Pasley was convicted of two assaults.

This clear constitutional violation suggests another. Everyone involved in Mr. Pasley's 2020 plea appears to have been confused about the factual basis for the indecent liberties counts. The trial court found a factual basis, but the materials on which it relied do not support that finding, and the prosecution disavowed it in the very same proceeding.

Standing alone, this misunderstanding might not sustain a collateral attack on the plea as involuntary. See Matter of Hilyard, 39 Wn. App. 723, 726, 695 P.2d 596 (1985) (recognizing "rule prohibiting collateral attacks upon guilty pleas based on an alleged violation of CrR 4.2(d)"). But the apparent

[5] Mr. Pasley's plea agreement did not waive double jeopardy protections. CP 200-10.

misunderstanding combined with the double jeopardy violation (which does entitle Mr. Pasley to collateral relief)[6] strongly suggests that Mr. Pasley overestimated the State's authority to punish him. This is exactly what a proper CrR 4.2 inquiry is designed to prevent, and it seriously undermines any confidence that Mr. Pasley's 2020 pleas resulted from an informed risk-benefit analysis. See D.T.M., 78 Wn. App. at 220.

Because the ROA determination required the resolution of factual disputes, the trial court properly declined to make this determination "as a matter of law." Sub. No. 94 at 1. No precedent permits (much less requires) the trial court to credit every unadjudicated and incriminating allegation in "conviction materials" related to an alleged ROA (while simultaneously discrediting exculpatory information in those materials). State's Resp. at 63 & n.7. But even if McNutt, Marshall, or Brown suggested such a rule, its application would be unjust where the

[6] State v. Knight, 162 Wn.2d 806, 811-12, 174 P.3d 1167 (2008).

conviction in question appears to have been obtained in violation of constitutional protections.

II. REPLY TO STATE'S RESPONSE

A. ISSUES IN REPLY

1. The evidence was insufficient to support the State's "substitute victim" theory of the recent overt act (ROA).

2. Mr. Pasley did not offer K.R.'s statement as a "hearsay exception" under ER 803(a)(3); rather, the statement was not hearsay at all.

B. ARGUMENT IN REPLY

1. The evidence was insufficient to support the State's "substitute victim" theory.

The State accurately describes Mr. Pasley's testimony, regarding his sexual contact with K.R., at pages 14-16 of its response brief. As Mr. Pasley explained in his opening brief, this testimony describes a mutually consenting encounter.

Nevertheless, the State argues there was other substantive evidence from which the trial court could find, beyond a

reasonable doubt, that K.R. did not consent. State's Resp. at 32. According to the State, this includes evidence that K.R. was crying during a phone call that occurred between the second and third instance of sexual contact, and that he eventually left Mr. Pasley's house. State's Resp. at 32-33.

First, even if K.R.'s behavior after the sexual contact implied a lack of consent, there is no evidence that he communicated that lack of consent to Mr. Pasley during their sexual contact. Nor would the State have had to allege or prove any *mens rea* to secure a conviction for third-degree rape based on non-consent. State v. Higgins, 168 Wn. App. 845, 854-55, 278 P.3d 693 (2012) (quoting State v. Elmore, 54 Wn. App. 54, 57 n.5, 771 P.2d 1192 (1989)); Laws of 2019, ch. 87, § 3 (amending third-degree rape statute to omit element that victim's lack of consent be "clearly expressed").

Second, even if Mr. Pasley *had* committed third-degree rape, this would not be a sexually violent offense. RCW 71.09.020(18) (third-degree rape not a "sexually violent offense"

for purposes of Sexually Violent Predator Act (SVPA)). Therefore, it would qualify as an ROA only if it indicated to a reasonable person that Mr. Pasley would commit a different offense, which *is* sexually violent. See RCW 71.09.020(13) (ROA "means any act, threat, or combination thereof that . . . creates a reasonable apprehension of such harm in the mind of an objective person who knows the history and mental condition of the person engaging in the act or behaviors"). At his SVP commitment trial, the State argued this definition was satisfied because K.R. was a "substitute" for Mr. Pasley's preferred adolescent victims. State's Resp. at 38.

But the "substitute victim" cases involve respondents who habitually offended against children, and who committed ROAs against substitute adult victims while confined in institutions. Det. of Anderson, 166 Wn.2d 543, 211 P.3d 994 (2009); Det. of Froats, 134 Wn. App. 420, 140 P.3d 622 (2006); see BOA at 30-32. As noted in the opening brief, both cases involved overwhelming evidence that these respondents desired to commit

the same offenses against children and would do so if they had access to children. Anderson, 166 Wn.2d at 550 (evidence, including ROA, established clear risk of reoffense against children *if respondent was released from custody*); Froats, 134 Wn. App. at 439-40 ("[a] reasonable person familiar with Froats's history and mental condition could conclude, as the State's expert did, that Froats's conduct was a form of symptom substitution that portends future harm of a sexually violent nature *if he were released from custody*"). In these cases, the acts at issue created a reasonable apprehension of sexual violence because they suggested the respondent *would* commit such an act *if released* into the general population. Id.

Mr. Pasley's sexual contact with K.R. suggests the opposite. Consistent with Dr. Abbott's and Ms. Jones's testimony, it showed Mr. Pasley understands that children cannot consent to sexual contact, and instead sought sexual contact with an adult. See BOA at 31. Even if Mr. Pasley misunderstood K.R.'s actual feelings about their encounter (and the evidence at

trial was insufficient to prove this misunderstanding), the evidence showed he was working to address that misunderstanding in treatment. RP (April 20, 2022) at 371-72, 407-10; RP (April 21, 2022) at 584, 624-25. It did not show that, during all his time released to the community, Mr. Pasley sought sexual contact with K.R. because he could not access a child victim.

2. The State misunderstands the evidentiary rule at issue here: K.R.'s statement was offered for its effect on *Mr. Pasley*, not as evidence of K.R.'s actual state of mind; it was therefore not hearsay at all.

In the trial court, the State expressly declined to call Mr. Pasley as a witness, arguing it wanted to rely solely on his deposition. RP (Feb. 25, 2022) at 31-32. But it edited out of that deposition exculpatory statements indicating K.R. told Mr. Pasley their encounter was "cool" even though K.R. had a girlfriend. RP (Mar. 18, 2022) at 10-12.

The trial court permitted this because it mistakenly believed the statements were hearsay. RP (Mar. 18, 2022) at 13-

14. The State now defends the trial court's ruling as a proper application the Evidence Rules, but the State is mistaken.

The authority on which the State relies is State v. Parr, 93 Wn.2d 95, 98-99, 606 P.2d 263 (1980). State Resp. at 42-43. Parr involved the hearsay *exception* for evidence indicating "*the declarant's* then-existing state of mind." ER 803(a)(3) (emphasis added); Parr, 93 Wn.2d at 98 (discussing admission of victim's out-of-court statement "to be considered only as it bore on the state of mind of the victim"). By contrast, Mr. Pasley offered K.R.'s out-of-court statement as evidence of its effect on Mr. Pasley—the listener. RP (Mar. 18, 2022) at 13.

Evidence admitted for that purpose is *not hearsay*. State v. Chambers, 134 Wn. App. 853, 858-59, 142 P.3d 668 (2006). Accordingly, such a statement is admissible if relevant to a material fact—there is no additional corroboration requirement. State v. Heutink, 12 Wn. App. 2d 336, 356-57, 458 P.3d 796 (2020). In Heutink, on which the State now relies, Division One distinguished Parr on this basis. Id. at 356-57 & n.6 (rejecting

appellant's reliance on Parr, which involved the hearsay exception for out-of-court statements indicating the declarant's state of mind, in appeal challenging the admission of an out-of-court statement offered for its effect on the listener).

If the State wanted to challenge Mr. Pasley's recollection of K.R.'s statements—including the statement that what was "up" between them was "cool"—the appropriate manner in which to do so was cross-examination. State v. Duarte Vela, 200 Wn. App. 306, 321, 402 P.3d 281 (2017) (rejecting State's reliance on Parr to defend trial court's erroneous exclusion of defendant's proffered testimony, in support of self-defense theory, that victim had threatened to kill his family). It was not appropriate for the State to preemptively edit Mr. Pasley's testimony by calling something hearsay when it was not. Id. And by falling for that tactic, the trial court committed a highly consequential legal error.

III. CONCLUSION

The trial court properly denied the State's pretrial motion for resolution of disputed factual issues as a "matter of law." This Court must reject the untenable arguments in the State's cross-appeal.

For the reasons given in the opening brief, the evidence was insufficient to sustain a finding that Mr. Pasley committed a recent overt act and defense counsel was ineffective for allowing critical exculpatory evidence to be erroneously excluded as hearsay. Each of these errors requires reversal of the civil commitment order.

I certify that this document was prepared using word processing software and contains 9,096 words excluding the parts exempted by RAP 18.17.

DATED this 3rd day of April 2023.

Respectfully submitted,

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